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No. 88-729

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT ROWE, *et al.*,

Petitioners,

v.

ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS ARMCO INC. AND THE ARMCO INC. PENSION AGREEMENT PLAN IN OPPOSITION TO CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED WITH RESPECT TO THE ARMCO RESPONDENTS

The only question directly involving the Armco Respondents which is properly presented for review is included in Petitioners' Question VI, which in part concerns whether the District Court lacked subject matter jurisdiction over the Group 3 Petitioners' ERISA claim against the Armco Respondents. The Armco Respondents frame that question as follows:

> Whether the Court of Appeals correctly affirmed the decision of the District Court that it lacked subject matter jurisdiction over the ERISA-based fiduciary duty claim of the Group 3 Petitioners against the Armco Respondents on the ground that the Group 3 Petitioners were not participants in the Armco pension plan.

PARTIES TO THE PROCEEDING AND LIST OF SUBSIDIARIES AND AFFILIATES

The parties to the proceeding, including the names of the individual Petitioners, are listed in the Petition. The Respondents are Armco Inc., Allied Corporation, and the pension plans they maintain for certain of their hourly represented employees—the Allied Chemical Corporation Hourly Employees' Pension Plan ("the Allied Plan") and the Armco Inc. Pension Agreement Plan ("the Armco Plan"). For ease of reference, and consistent with the proceedings below, Armco and its Plan will be referred to together herein as "the Armco Respondents" and Allied and its Plan as "the Allied Respondents."

The individual Petitioners are all former hourly employees of Allied at its former coke-producing facility in Ashland, Kentucky. While working for Allied the individual Petitioners were represented for collective-bargaining purposes by Petitioner Local 3-523, Oil Chemical & Atomic Workers International Union, AFL-CIO ("OCAW").

Armco Inc. owns in part or is affiliated with the following companies: Acerex; Aceros Del Sur S.A.; Armco Columbo S.P.A.; Armco Equipetrol S.A.; Armco Industrial S.A.; Armco Instapanel, S.A.; Armco Moly-Cop S.p.A.; Armcopaxi S.A.; Armco Peruana S.A.; Australian Steel & Mining Corporation, Pty. Ltd.; Black River Lime Company; Bundy Venezolana C.A.; Control International, Inc.; D.I.F.S.I.C.A; Charles Fulton Holdings Ltd.; Charles Fulton Pty. Ltd.; Charles Fulton Sendirian Berhard; Charles Fulton 1982 Ltd.; Inmobiliara Hierro y Accro, S.A.; Metaltubos C.A.; Northern Land Company; Obras Civiles e Industrias C.A.; Productos Metalicos

Armco S.A.; Prolansa (Productora de Alambres y Derivados S.A.); Reserve Mining Company; Torcad Limited; Winning Post Investment Ltd.

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BRIEF OF RESPONDENTS ARMCO INC. AND THE ARMCO INC. PENSION AGREEMENT PLAN IN OPPOSITION TO CERTIORARI

STATUTES INVOLVED

As respects the claim of the Group 3 Petitioners against the Armco Respondents, the case involves the following provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* ERISA § 3(7), 29 U.S.C. § 1002(7):

> The term "participant" means any employee or former employee of an employer, or any

> member or former member of an employee organization, who is or may be eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2):

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought —
>
> * * *
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.

COUNTERSTATEMENT OF THE CASE

These consolidated actions[1] concern pension-related issues arising from the sale by Allied to Armco of a coke-producing facility in Ashland, Kentucky. The Petitioners are divided into three groups, as they were as plaintiffs below. The Group 1 and 2 Petitioners asserted claims against the Allied Respondents only, which generally concern whether they were entitled to "80-point" early retirement pensions from Allied upon the sale. In separate counts, the Group 3 Petitioners asserted common law and ERISA-based

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[1] The original action herein, *Robert Rowe, et al. v. Allied Chemical Hourly Employees Pension Plan, et al.*, Civil Action No. 83-282, was consolidated with *Oil, Chemical and Atomic Workers International Union, et al. v. Allied Corporation, et al.*, Civil Action No. 84-278.

claims against both the Allied and Armco Respondents. As respects the Armco Respondents, the matter before this Court involves only the ERISA-based claim of the Group 3 Petitioners asserted in Count VA of the Amended Complaint. That claim was dismissed by the District Court for lack of subject matter jurisdiction because these Petitioners were never employed by Armco and were not participants in the Armco Plan. The Court of Appeals affirmed that decision.

The facts upon which the decisions of the lower courts rest are stipulated by the parties. As to issue of the District Court's subject matter jurisdiction over the claim of the Group 3 Petitioners against the Armco Respondents, the facts may be simply stated: all of the Group 3 Petitioners retired from Allied prior to the sale of the coke plant; none of them was ever employed by Armco and none was, therefore, ever a participant in the Armco Plan.

The terms of the sale were embodied in a written agreement dated December 31, 1981, executed by Allied and Armco. Upon the sale, Armco provided uninterrupted employment to all hourly employees on the Allied payroll at the date of sale. The sales agreement contains provisions governing pension benefits for the Allied employees hired by Armco. Allied employees who retired from Allied on or before the sale date or who were not hired by Armco continued to be covered solely under the Allied Plan.

Under the sales agreement, Allied transferred to the Armco Plan funds equivalent to the actuarial value of the benefits earned under the Allied Plan as of the date of sale by those former Allied employees hired by Armco. Armco agreed to credit the service

of each such employee under the Allied Plan for eligibility or vesting. Those employees could then, upon retirement from Armco, elect benefits under the Armco Plan based on their combined Armco-Allied service, or they could elect the benefits accrued under the Allied Plan as of the date of sale plus any benefits accrued under the Armco Plan subsequent to sale. Under the sales agreement, Armco also agreed to incorporate into the Armco Plan an early retirement feature of the Allied Plan, known as the "80-point pension," for those Allied employees who were hired by Armco and who at the time of sale were eligible to receive this benefit under the Allied Plan.

The Group 3 Petitioners were eligible, upon retirement under the Allied Plan, for an optional method of pension payments known as the Social Security option.[2] The Armco Plan did not have such a payment option, and, during pre-sale negotiations with Allied, Armco spokesmen indicated that Armco would not adopt it. The sale proceeded on that basis. Almost a year later, when confronted with a specific claim and threatened litigation by a coke worker formerly employed by Allied, Armco reexamined the issue and decided to adopt the option.

The Group 3 Petitioners allege that during the pre-sale negotiations with Allied, the Armco Respondents willfully or negligently misrepresented that they would not provide a Social Security option under the Armco

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[2] Essentially, the Social Security option enabled an employee to retire early and receive higher than normal retirement payments until he or she became eligible to receive Social Security payments, at which time the retirement payments would be adjusted to a lower than normal level. The option is designed to provide a relatively level revenue stream for early retirees.

Plan for former Allied employees, and that in reliance on this alleged misrepresentation the Group 3 Petitioners retired from Allied prior to the sale, instead of going to work for Armco. The Group 3 Petitioners contend that this alleged conduct of the Armco Respondents violated their common law duty to the Group 3 Petitioners and breached their duties as fiduciaries of the Armco Plan under § 404 of ERISA, 29 U.S.C. § 1104.

Summary judgment was entered on behalf of all Respondents with respect to the Group 3 claims on April 1, 1987 (and with respect to the Groups 1 and 2 claims on September 16, 1986). With respect to the Group 3 claim against the Armco Respondents, the District Court adopted the January 6, 1987 Report and Recommendation of Magistrate Joseph M. Hood (Pet. App. 22a-30a), who had concluded that the court lacked subject matter jurisdiction over the Group 3 Petitioners' ERISA claim against the Armco Respondents because the Group 3 Petitioners were not and had never been participants in the Armco Plan.[3]

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[3] Neither the Magistrate nor the District Court addressed the merits of the Group 3 Petitioners' common law misrepresentation claims against the Armco Respondents. Having found that the Group 3 Petitioners could not assert a federal cause of action under ERISA, the Magistrate recommended that the Petitioners' state-law claims be dismissed for want of subject matter jurisdiction, without prejudice. Pet. App. 26a. Also, the court below did not address the question of which, if any, of the individual Petitioners actually relied on the alleged misrepresentation in deciding to retire. No facts were stipulated and no evidence was offered on that issue. No issue regarding these common law claims has been raised in the Petition.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court dismissing the Group 3 Petitioners' claim on jurisdictional grounds. The Court of Appeals held that the Group 3 Petitioners were not participants in the Armco Plan within the meaning of § 3(7) of ERISA, 29 U.S.C. §1002(7). Pet. App. 11a. The Court also held that the Social Security option was not an accrued benefit under ERISA and, therefore, any Armco decision with respect to the option was not reviewable under ERISA's fiduciary standards. Pet. App. 12a.

REASONS FOR DENYING THE WRIT

1. The Petition Does Not Seriously Question The Correctness Of The Decision Below And Confuses The Issues And Misstates The Facts As Respects The Armco Respondents.

Petitioners' treatment of the only question concerning the Armco Respondents (Question VI, Pet. 17), could not be more cursory.[4] In the one-half page

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[4] The composition of the Petition makes it difficult to discern whether Petitioners are attempting to implicate the Armco Respondents in other Questions presented for review. If so, Petitioners are raising such issues for the first time and, in any case, any such arguments appear to be based on fundamental misstatements of fact. For example, Petitioners' Question I asks "[w]hether . . . Allied *and Armco* unlawfully unilaterally amended the [Allied] Plan . . ." (Pet. i) (emphasis supplied). Similarly, in their argument, Petitioners wrongly state that "the Court of Appeals in its decision below accepted that Allied *and Armco* could amend the [Allied Pension] Plan." Pet. 10a (emphasis added). However, as the Court of Appeals (Pet. App. 5a, 7a-8a) and Petitioners themselves (Pet. 7) recognized, the claim of alleged unilateral amendment of the Allied Plan was asserted be-

Petitioners allot to the question, they do not seriously dispute the correctness of the decision of the Court of Appeals, they cite no precedent, let alone any precedent in conflict with the Court of Appeals, and they cite no reasons of policy justifying review by this Court. Petitioners make no effort to discuss the Sixth Circuit's reasoning on whether they were participants in the Armco Plan or on the alternative holding that the Social Security option is not an accrued benefit implicating ERISA fiduciary duties.

Petitioners merely hint at two possible related arguments. First, they assert that ERISA defines "participant" as including members or former members of an "employee organization" and that because Group 3 Petitioners were members of OCAW, an employee

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low against the Allied Respondents only. No question of Armco having allegedly amended the Allied Plan (if that is possible) was ever raised, briefed, or adjudicated.

The same observation applies to the Petitioners' claim under ERISA § 208 (29 U.S.C. § 1058). Although Petitioners' Question IV purports to ask "[w]hether *the Respondents* violated 29 U.S.C. § 1058 . . ." (emphasis added), that claim was raised below and adjudicated with respect to the Allied Respondents only. See Pet. 14-16; Pet. App. 5a, 8a-9a.

Finally, and although it is not clear, the Petitioners appear to characterize, wrongly, the OCAW as a party to the Group 3 claim against the Armco Respondents. They headnote their argument with respect to the Group 3 claim against the Armco Respondents as follows:

> This Court Should Review The Lower Courts [sic] Decision To Strip The Group 3 Petitioners *And The OCAW* Of Their Right To Challenge Armco's Action.

Pet. 17 (emphasis added). The OCAW was not a party to any claim against the Armco Respondents in the proceedings below.

organization, they are entitled to benefits under the Armco Plan. The purported argument stands singularly on that naked assertion with no authority, no discussion or reasoning and not the slightest reference to the Sixth Circuit's dismantling of the same argument below. Second, Petitioners contend that "Armco agreed to preserve the Group 3 Petitioners' options by contract and accepted assets from Allied for that purpose." Pet. 17. This is simply a misstatement of fact which flatly contradicts the stipulated record. It is the same misstatement of fact which was recognized as such and rejected by the Court below. As stipulated and as the Court of Appeals recognized, the sales agreement accorded rights under the Armco Plan *only* to former Allied employees whom Armco hired. Pet. App. 11a-12a. Thus, Armco agreed to preserve benefits *only* for those who became its employees, and Armco accepted assets from Allied *only* with respect to those who became its employees.[5]

Because Petitioners do not even suggest a conflict among the circuits or seriously question the decision below on the Group 3 jurisdictional issue, certiorari is not warranted. Rule 17.1, Supreme Court Rules. Indeed, the Petitioners' off-hand, confusing and inaccurate treatment of the issue leaves both Respondents and the Court uncertain as to the reasons behind the Petition and itself calls for denial of the Writ. Rule 21.5, Supreme Court Rules. The one contention articulated in the Petition amounts to a hypertechnical factual dispute which, aside from being

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[5] Further, it was stipulated that the amount of assets which were transferred to Armco's Plan by the Allied Plan for any individual did not take into account the Social Security option, which is the only subject of the Group 3 claims herein.

contrary to the parties' stipulations, is not grounds for review. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

2. There Is No Conflict Among The Courts Of Appeals Concerning Any Issue Raised By The Petition.

Pursuant to the plain terms of ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), every Court of Appeals that has considered the question has held that, aside from the Secretary of Labor and plan fiduciaries, only participants and beneficiaries of a plan may bring an ERISA civil action for breach of fiduciary duties. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-45 (4th Cir. 1986); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986), *cert. denied*, 479 U.S. 916 (1986); *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983); *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983), *cert. denied* 464 U.S. 845 (1983); *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980); *Coleman v. General Electric Co.*, 643 F. Supp. 1229, 1234-36 (E.D. Tenn. 1986), *aff'd without published opinion* 822 F.2d 59 (6th Cir. 1987); 29 U.S.C. § 1132(a)(2). The decision of the Court of Appeals is consistent with this precedent.

In recognizing the clear and narrow limits on subject matter jurisdiction under ERISA, these decisions are also consistent with this Court's unanimous ruling in *Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983). There, a trust holding funds under an ERISA-covered employee benefit plan removed to federal court a state-court action brought by state tax

authorities to enforce tax levies against the funds. This Court held that removal was improper because the state court action filed by the tax authorities did not and could not arise under ERISA, since the plaintiff state tax board was not within the limited statutory class of persons who may sue under ERISA:

> Section 502(a) specifies which persons—participants, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies or for other purposes.
>
> * * *
>
> ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 25, 27.

With respect to other ancillary issues raised below by the Group 3 Petitioners, the Sixth Circuit's decision is also consistent with precedent. Specifically, the Court of Appeals rejected Petitioners' contention below that their lack of participant status should somehow be "excused" for purposes of ERISA subject matter jurisdiction because the lack of participation was allegedly a result of purported misrepresentations

by the Armco Respondents.[6] As the Ninth Circuit wrote in dismissing an ERISA fiduciary duty claim in similar circumstances:

> The very thrust of [plaintiff's] claim is that he did not participate in the plan because he was misled as to the cost of participation. Yet, for whatever reason, he did not in fact participate. This court cannot rewrite history and declare that he did participate.

Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc., supra, 721 F.2d at 656. The same result was reached under similar facts in other cases. *Stanton v. Gulf Oil Corp., supra; Loechl v. Illinois Bell Telephone Co.*, 648 F. Supp. 1178 (N.D. Ill. 1986);[7] *Coleman v. General Electric Co., supra*, 643 F. Supp. at 1234-36.[8]

In contrast, no Court of Appeals has accepted Petitioners' position. No Court of Appeals has held, as Petitioners suggest should be the rule (Pet. 17),

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[6] This argument is not specifically restated in the Petition.

[7] In *Loechl*, the court held that it lacked ERISA subject matter jurisdiction over an action brought by former employees to obtain benefits under a special early retirement plan instituted after their retirement, despite the plaintiffs' allegation that they had retired under the regular plan in reliance on the employer's misrepresentation that the special plan would not be offered in the future. The court reasoned that the plaintiffs never became participants in the special plan.

[8] In *Coleman*, the court held that the buyer of a facility had no ERISA duty to employees of the seller during purchase negotiations; and, as non-employees of the buyer and non-participants in the buyer's plan, the seller's former employees could not bring an ERISA action for alleged misrepresentations with respect to the benefits to be provided under the buyer's plan.

that *any* member of an "employee organization" is a participant in the pension plan of an employer simply because the employee organization represents some of the employer's employees. In addition, no Court of Appeals has held that a person who *might have become* an employee of an employer qualifies as a person who "may become eligible" for a benefit under the employer's plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7). To the contrary, as recognized, that statutory language has been held to refer solely to current employees already covered by the employer's plan who will, upon meeting specified requirements, become eligible for benefits under the plan. It does not include persons, like Group 3 Petitioners, who never became participants in the plan. *Nugent v. Jesuit High School of New Orleans, supra*, 625 F.2d at 1287; *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d at 655; Pet. App. 12a.

In addition to ruling that the Group 3 Petitioners were not participants in the Armco Plan, the Court of Appeals held that because the Social Security option is not an accrued benefit under ERISA, any decision by Armco with respect to the option is not reviewable under ERISA fiduciary standards. Pet. App. 12a. Petitioners do not here contend that this ruling was incorrect. While the issue does not appear to have been addressed in the case law, the decision of the Court of Appeals is, in any event, fully supported by ERISA's legislative history. See H.R. Rep. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4726; *see also* H.R. Conf.

Rep. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054.[9]

3. The Petition Does Not Present An Important Federal Question For Review By This Court.

The unanimity of the Court of Appeals decisions addressing the subject matter jurisdiction issue raised by Petitioners, as well as the consistency of those decisions with this Court's *Franchise Tax Board* opinion, verifies that no important federal question is here presented. No Court of Appeals has had difficulty applying the statutory definition of "participant" as it impacts on who may sue for breach of fiduciary duty. The clarity of ERISA § 502(a), as recognized in *Franchise Tax Board*, means that there is presented no substantial or genuine question of statutory construction. The Petitioners' halfhearted treatment of the issue bespeaks the run-of-the-mill nature of this case as respects the lack of ERISA subject matter

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[9] While the Court of Appeals did not address the point, we note that the decision is correct on the alternative ground that ERISA provides no redress for the claim of the Group 3 Petitioners against the Armco Respondents. The Group 3 Petitioners seek one basic remedy in this case - *i.e.*, compensatory damages for having foregone employment with Armco. They do not seek, nor can they be awarded, benefits under either the Allied or the Armco Plan, as they are presently being paid all benefits due under the former and never became participants in the latter. Nor do they assert that the Armco Plan has itself been financially damaged by the Respondents' alleged acts; rather, their claims are purely personal and, as such, not redressable under ERISA's fiduciary duty provisions. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), this Court held squarely that ERISA does not allow a private right of action for compensatory damages for an alleged breach of fiduciary duties.

jurisdiction. The application of straightforward statutory language to stipulated facts, carried out by the Court of Appeals in a facially correct manner, does not warrant further examination by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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